

FEB 06 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6056

DATE COMPLAINT FILED: 8/20/08

DATE OF NOTIFICATION: 8/26/08

LAST RESPONSE RECEIVED: 1/22/09

DATE ACTIVATED: 10/09/08

STATUTE OF LIMITATIONS: 7/13/13-
8/01/13

COMPLAINANT:

Mike Coffman

RESPONDENTS:

Protect Colorado Jobs, Inc.

John Berry

Curt Cerveney

Armstrong for Congress and Brian Watson,
in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)

2 U.S.C. § 441b(a)

11 C.F.R. § 100.17

11 C.F.R. § 100.22

11 C.F.R. § 100.26

11 C.F.R. § 100.27

11 C.F.R. § 109.21

11 C.F.R. § 114.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

The Complaint alleges that Protect Colorado Jobs, Inc. ("PCJ"), a 501(c)(4) organization, improperly used corporate funds to pay for a mailer attacking the Complainant, Mike Coffman, a candidate for U.S. House of Representatives from Colorado's 6th Congressional District, that was disseminated shortly before the 2008

1 primary election. Complainant asserts that PCJ's agent and treasurer, Curt Cervený
2 ("Cervený"), used PCJ's corporate account to pay for the mailer.

3 Respondents PCJ and Cervený submitted a joint response that acknowledged
4 responsibility for the mailer but denied any violation of the Federal Election Campaign
5 Act of 1971, as amended ("the Act"). Respondents argue that the mailer was not a
6 prohibited corporate expenditure, as it did not constitute express advocacy, and was not
7 subject to the Commission's regulations regarding electioneering communications. See
8 11 C.F.R. §§ 100.22 and 100.29.

9 Based upon publicly available information suggesting that PCJ may have
10 coordinated the mailer with the campaign of Wil Armstrong, a primary election opponent
11 of Coffman, we gave Armstrong for Congress ("AFC"), Armstrong's authorized
12 campaign committee, an opportunity to respond. Our letter advised AFC of this
13 information and that the amounts spent on the mailer could be considered an
14 impermissible in-kind contribution. See 2 U.S.C. § 441b(a) and 11 C.F.R. § 109.21.
15 AFC responded to our notification with a general denial, averring that it was unaware of
16 any "coordinated efforts" between AFC agents/employees and PCJ. See Armstrong
17 Response at 1.

18 As discussed in more detail below, because it appears there is a sufficient basis to
19 investigate this matter, we recommend that the Commission find reason to believe that
20 Protect Colorado Jobs, Inc. made, and Curt Cervený, as a PCJ officer, consented to, a
21 prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a). We also recommend
22 that the Commission find reason to believe that Armstrong for Congress accepted and

1 received a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a) and failed to
2 report the prohibited in-kind corporate contribution in violation of 2 U.S.C. § 434(b).

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. FACTUAL BACKGROUND**

5 During the pertinent time period, the Complainant, Mike Coffman, served as the
6 Secretary of State for Colorado. With the impending retirement of 6th District incumbent
7 Representative Tom Tancredo, Complainant announced his candidacy for the seat and
8 joined a crowded field of Republican primary candidates including Wil Armstrong, Ted
9 Harvey, and Steve Ward. The primary was held on August 12, 2008.

10 **1. Protect Colorado Jobs, Inc.**

11 PCJ is a nonprofit corporation registered with the Colorado Secretary of State.
12 PCJ organized May 4, 2007, and listed as its primary purpose "to promote economic
13 development for its members in Colorado without engaging in regular business.... " See
14 COLORADO SECRETARY OF STATE, ARTICLES OF INCORPORATION, PROTECT COLORADO
15 JOBS, INC. Although its Articles of Incorporation state it is formed exclusively as a social
16 welfare organization within the meaning of section 501(c)(4) of the Internal Revenue
17 Code, PCJ has not sought tax exempt status with the Internal Revenue Service. Its
18 registered agent is John Berry, the current treasurer and initial incorporator of the
19 organization. At all relevant times, Cerveney was an agent/treasurer of PCJ. PCJ's
20 primary activity has supported the Colorado Right-to-Work Initiative, a ballot initiative
21 on the November 4, 2008, general election ballot.

22 The Right-to-Work Initiative was also supported by Colorado Right-to-Work

1 Committee ("CRTW"),¹ a state-registered issue committee. Like PCJ, John Berry is
2 CRTW's registered agent. Cervený was the political consultant running the campaign for
3 the Right-to-Work Initiative. *See Colorado Right to Work Initiative (2008)*,
4 [http://ballotpedia.org/wiki/index.php?title=Colorado Right to Work Initiative %28200](http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008%29).
5 CRTW's counsel was Scott Gessler, who is also campaign legal advisor for Wil
6 Armstrong and Armstrong for Congress. *See Vuong, Andy, Right to Work Committee*
7 *Penalized \$9,750*, THE DENVER POST, October 16, 2008; Bragg, Chris, *Gessler Fingered*
8 *in Mail Attack on Coffman*, THE COLORADO STATESMAN, August 8, 2008. During the
9 relevant time period, Gessler, Cervený, and Berry worked towards passing the Right-to-
10 Work Initiative with the combined efforts of PCJ and CRTW. (This Office has included
11 a chart to demonstrate the relationship of Respondents and witnesses for easy reference.
12 Attachment 1.)

13 Available information shows that PCJ has contributed \$289,000 to CRTW to
14 support the collection of signatures to put the measure on the November ballot, and, in
15 fact, PCJ was the only source of funds to CRTW. *See Colorado Right to Work Initiative*
16 *(2008)*,
17 [http://ballotpedia.org/wiki/index.php?title=Colorado Right to Work Initiative %28200](http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008%29).
18 PCJ steadily contributed funds to CRTW from December 10, 2007, through April 10,
19 2008. State financial disclosure records reflect no further contributions by PCJ to CRTW
20 after the initiative was certified for the general election on April 28, 2008. *See*
21 COLORADO SECRETARY OF STATE, CONTRIBUTION RECORDS,

¹ Additional organizations involved in the effort to pass the initiative include Defend Our Economy, registered agent John Berry, which has the same registered address as PCJ, and A Better Colorado, whose registered agent, Mario Nicolais, is Respondents' counsel and an associate attorney for the law firm of Hackstaff and Gessler of which Scott Gessler is a principal.

1 <http://www.sos.state.co.us/cpf/ContribCriteriaPage.do;jsessionid=0000OKCfB2RvrOPbv>
2 [x; Colorado Right to Work Initiative \(2008\)](#),
3 [http://ballotpedia.org/wiki/index.php?title=Colorado Right to Work Initiative %282008](http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008).
4 Local reports revealed that CRTW's campaign efforts also ceased after April 2008. See
5 *Campaign 2008*, (<http://www.politicswest.com/campaign2008?page=4>).

6 2. The PCJ Mailer

7 In July 2008, funds from PCJ's corporate account were used to pay for the
8 creation and distribution of the subject mailer, distributed to approximately 50,000 Sixth
9 District registered Republican voters. See 501(c)(4) Chair Arranged Unauthorized Anti-
10 Coffman Attack Piece, [http://www.politickerco.com/jeremypelzer/1874/501c4-chair-](http://www.politickerco.com/jeremypelzer/1874/501c4-chair-arranged-unauthorized-anti-)
11 [arranged-unauthorized-anti-](#).

12 One side of the mailer consists of a large photograph identified as that of Mike
13 Coffman and a statement: "Call Mike Coffman and ask him to stop increasing his office
14 budgets, comply with immigration laws, and adopt strict office protocols to prevent
15 political influence." Attachment 2, page 1. The other side of the mailer begins with a
16 bold print headline, "MIKE COFFMAN: AFTER 20 YEARS IN PUBLIC OFFICE,
17 HE'S TURNED INTO A BIG GOVERNMENT PROFESSIONAL POLITICIAN."
18 Attachment 2, page 2. The mailer further states that during Coffman's public service as
19 State Treasurer and his current role as Secretary of State, he increased office budgets and
20 failed to adequately manage staff. The mailer includes quotes from local newspapers
21 critical of Coffman. A single quote refers to Coffman's congressional bid: " 'The chief
22 of staff to Secretary of State Mike Coffman is doing campaign work for Coffman's
23 congressional bid in an apparent breach of ethics, according to government watchdog

1 groups.' *ROCKY MOUNTAIN NEWS, March 7, 2008.*" Attachment 2, page 2. The bottom
2 portion of this side of the mailer includes a disclaimer stating that it is paid for by PCJ,
3 listing PCJ's address, and stating that the mailer is not authorized by any candidate or
4 candidate's committee. *Id.*

5 PCJ issued the mailer shortly before the primary held on August 12, 2008. The
6 6th District race drew substantial local media attention, as did the PCJ mailer. Coffman's
7 primary opponents Wil Armstrong, Ted Harvey, and Steve Ward denied responsibility
8 for the mailer. *See Politigab, THE COLORADO SPRING GAZETTE, August 5, 2008.* On
9 July 31, 2008, John Berry issued a press release on behalf of PCJ apologizing to Coffman
10 and stating that PCJ officer/treasurer Curt Cerveney produced the mailer without the
11 knowledge or consent of PCJ members to use its corporate account to pay for the mailer.²
12 Several newspaper articles quoted Berry asserting that Cerveney may have used funds
13 belonging to another person that were deposited into PCJ's account. *See Politigab, THE*
14 *COLORADO SPRING GAZETTE, August 5, 2008.* Local media reported that unnamed
15 members of the Coffman campaign stated Gessler paid approximately \$15,000 to PCJ for
16 the mailer, and Cerveney was paid \$3,000 to \$4,000 for producing the mailer. *See Bragg,*
17 *Chris, Gessler Fingered in Mail Attack on Coffman, THE COLORADO STATESMAN, August*
18 *8, 2008.* This Office does not have information at this time indicating whether the
19 \$15,000 reportedly paid by Gessler represents the actual costs of producing and
20 disseminating the mailer. The press release further advised that Cerveney had resigned
21 from PCJ on July 31, 2008.

22 While Coffman's primary opponents continued to deny any involvement with the
23 PCJ mailer, local media soon assigned responsibility for the mailer to Scott Gessler, the

² Available information, including the Articles of Incorporation for PCJ, does not identify these members.

1 campaign legal advisor of Wil Armstrong. *See Bragg, Chris, Gessler Fingering in Mail*
2 *Attack on Coffman*, THE COLORADO STATESMAN, August 8, 2008. Local media reported
3 the Coffman campaign's assertion that Wil Armstrong instigated the mailer, though the
4 Armstrong campaign denied such action. *See Campaign 2008*,
5 (<http://www.politicswest.com/campaign2008?page=4>). *See also* Armstrong Response at
6 1.

7 **B. LEGAL ANALYSIS**

8 The Complaint alleged that PCJ used corporate funds to pay for the mailer.
9 Respondents assert that they have not violated the Act because PCJ's payment for the
10 mailer does not constitute an impermissible corporate expenditure. PCJ/Cervený
11 Response at 2-3. There are three potential ways in which PCJ's use of corporate funds
12 may have been improper: (1) corporate expenditure; (2) electioneering communication;
13 and (3) coordinated communication.

14 **1. Corporate Expenditure**

15 The Act generally prohibits corporations from making expenditures in connection
16 with federal elections. *See* 2 U.S.C. §§ 441b(a) and 431(9); 11 C.F.R. § 114.2(b)(2).
17 This prohibition includes express advocacy communications by a corporation outside of
18 its restricted class. 11 C.F.R. §§ 114.2(b)(2)(ii) and 100.22. Respondents deny that the
19 PCJ mailer constituted express advocacy because it contained a call to action unrelated to
20 Coffman's election or defeat, and it did not reference Coffman's candidacy.
21 PCJ/Cervený Response at 3. In fact, the mailer does reference the Complainant's
22 candidacy:

23 The chief of staff to Secretary of State Mike Coffman is doing campaign
24 work for Coffman's congressional bid in an apparent breach of ethics,

1 according to government watchdog groups. *ROCKY MOUNTAIN NEWS*,
2 *March 7, 2008*.

3
4 Under the Commission's regulations, a communication contains express advocacy
5 when it uses phrases, campaign slogan(s), or individual word(s), which in context have
6 no other reasonable meaning than to urge the election or defeat of one or more clearly
7 identified candidate, such as posters, bumper stickers, or advertisements, etc, which say
8 "Nixon's the One," "Carter 76," "Reagan/Bush," or "Mondale!" See 11 C.F.R.
9 § 100.22(a). The PCJ mailer does not contain language that would satisfy section
10 100.22(a) of the Commission's regulations.

11 The Commission's regulations also provide that a communication will be
12 considered express advocacy if it contains an "electoral portion" that is "unmistakable,
13 unambiguous, and suggestive of only one meaning" and about which "reasonable minds
14 could not differ as to whether it encourages actions to elect or defeat" a candidate when
15 taken as a whole and with limited reference to external events, such as the proximity to
16 the election. 11 C.F.R. § 100.22(b). In the Explanation and Justification of then newly-
17 promulgated section 100.22, the Commission stated that "communications discussing or
18 commenting on a candidate's character, qualifications, or accomplishments are
19 considered express advocacy under new section 100.22(b) if, in context, they have no
20 other reasonable meaning than to encourage actions to elect or defeat the candidate in
21 question." See 60 Fed. Reg. 35292 (July 6, 1995).

22 The mailer is critical of Coffman, with limited references that appear to question
23 Coffman's character and accomplishments. Specifically, Coffman is referred to as a
24 "Professional Politician," and a "flip-flopper," who has, according to the mailer, greatly
25 increased his office's budget in his positions as State Treasurer and Secretary of State.

1 See Attachment 2, page 2. Despite these references, the mailer is subject to a reasonable
2 interpretation other than encouraging a vote against Coffman. The mailer details alleged
3 deficiencies in Coffman's fiscal management, staff supervisory responsibilities, and
4 supposed refusal to comply with immigration law, while encouraging the reader to
5 contact Coffman's state office to address these concerns. The communication can thus be
6 reasonably interpreted as enlisting the reader to contact Coffman's state office and
7 request action regarding his staff budgets, immigration, and ethics policies. Therefore,
8 the mailer does not satisfy the Commission's definition of express advocacy at section
9 100.22(b). Accordingly, the available information does not indicate that PCJ's payments
10 for its mailer constitute an impermissible corporate expenditure.

11 2. Electioneering Communication

12 Respondents also assert that the PCJ mailer does not constitute an electioneering
13 communication that has been impermissibly paid for with corporate funds. PCJ/Cervený
14 Response at 4. As Respondents note, the mailer, as a written communication, does not
15 meet the Act's definition of an electioneering communication. *See id.*; 2 U.S.C.
16 § 434(f)(3) (definition limited to broadcast, cable and satellite communications).
17 Accordingly, PCJ's use of corporate funds to pay for the mailer does not implicate the
18 Act's provisions regarding electioneering communications.

19 3. Coordinated Communication

20 Having concluded that the mailer does not constitute a corporate expenditure or
21 an electioneering communication, the only other way in which PCJ's use of corporate
22 funds for the mailer would have been improper is if the mailer was coordinated with any
23 candidate or candidate committee or agent thereof. If the mailer met the criteria set forth

1 in the Commission's coordinated communications regulations, PCJ's payment for the
2 mailer would constitute an impermissible in-kind corporate contribution. *See* 2 U.S.C.
3 §§ 441a(a)(7)(B)(i) and 441b(a); 11 C.F.R. §§ 109.21 and 109.22.

4 The criteria for a coordinated communication consists of three standards –
5 payment by someone other than the candidate, his committee or political party
6 committee; satisfaction of one or more of the four content standards; and satisfaction of
7 one or more of the six conduct standards. 11 C.F.R. § 109.21.³ Respondents, by denying
8 that the mailer constituted express advocacy or an electioneering communication,
9 addressed two of the "content" standards of the coordinated communications regulations
10 set forth below. *See* 11 C.F.R. § 109.21(c)(1) and (3).

11 a. Payment Prong

12 The payment prong of the coordination regulation at 11 C.F.R. § 109.21(a)(1) is
13 clearly satisfied. PCJ acknowledges on its mailer that it paid for the communication. *See*
14 Attachment 2, page 2.

³ In response to the decision in *Shays v. F.E.C.*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*"), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. *See* Final Rules and Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The amended regulations, among other things, 1) reduced the pre-election window during which certain communications that refer to a clearly identified House or Senate candidate are publicly distributed or otherwise publicly disseminated from 120 to 90 days, and 2) reduced the time period in which the common vendor provided services to the clearly identified candidate from the "current election cycle" to the "past 120 days." *See* 11 C.F.R. § 109.21(c)(4)(i) and (d)(4)(ii) (2007). Subsequently, in *Shays III*, the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Later, the D.C. Circuit affirmed the district court regarding the invalidity of the current standard for public communications made before the timeframes specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. June 13, 2008).

b. Content Prong

The content prong is satisfied where the communication at issue meets one of the following content standards: a communication that is an electioneering communication under 11 C.F.R. § 100.29; a public communication that republishes, disseminates, or distributes candidate campaign materials; a public communication containing express advocacy; or a public communication that refers to a clearly identified federal candidate that was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c)(1) - (4). It is the last of these content standards that appears to be met by the PCJ mailer.

The PCJ mailer meets the definition of a public communication because it 1) consisted of "a communication by means of ...mass mailing...to the general public," and 2) clearly identified Mike Coffman, a candidate in the Republican primary election for Colorado's 6th Congressional District held on August 12, 2008, featuring his name and image. See 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. "Mass mailing" means a mailing by "United States mail...of more than 500 pieces of mail matter of an identical...nature within any 30-day period." 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. Public information reviewed provides that PCJ forwarded the mailer through the U.S. mail to approximately 50,000 Sixth District registered Republican voters, starting the week of July 13, approximately four weeks before the primary. The Complaint asserts the mailer was distributed to "every Republican voter who requested a primary absentee ballot," while the Respondents acknowledge the mailer was distributed to "voters in the 6th Congressional District." See Complaint at 2 and PCJ/Cerveney Response at 1. The

1 mailer was also distributed less than 90 days before the August 12, 2008, primary in
2 Coffman's candidacy jurisdiction. Accordingly, we conclude the content standard is
3 satisfied.

4 **c. Conduct Prong**

5 The Commission's regulations set forth six types of conduct between the payor
6 and the committee or candidate that can satisfy the conduct prong whether or not there is
7 formal collaboration. *See* 11 C.F.R. § 109.21(d). Only three of these standards are
8 relevant in this case: (1) request or suggestion, (2) material involvement, and
9 (3) substantial discussion.

10 The conduct prong is met when a communication is created, produced or
11 distributed by a third party at the request or suggestion of a candidate or authorized
12 committee; or when a candidate or committee assents to a request or suggestion that the
13 public communication be created, produced, or distributed, and that suggestion came
14 from the third-party payor. *See* 11 C.F.R. § 109.21(d)(1)(i) and (ii). The Commission,
15 citing *Buckley v. Valeo*, 424 U.S. 1 (1976) and the Senate Reports accompanying the
16 1974 amendments to the Federal Election Campaign Act of 1971, as amended, has stated
17 "[a] request or suggestion encompasses the most direct form of coordination" and
18 requires a fact-based analysis. *Explanation and Justification for Coordinated and Indep.*
19 *Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). The second standard requires that
20 the candidate, his or her committee, or their agents be materially involved in the content,
21 dissemination, or timing of the communication. *See* 11 C.F.R. § 109.21(d)(2). The third
22 standard requires that the communication be created, produced, or distributed after at
23 least one substantial discussion about the communication between the third-party payor,

1 or that person's employees or agents, and the candidate or his or her authorized
2 committee, a political party committee, or any of their agents. A "substantial discussion"
3 includes informing the payor about the campaign's plans, projects, activities, or needs, or
4 providing the payor with information material to the communication. See 11 C.F.R.
5 § 109.21(d)(3).⁴

6 We believe there is reason to investigate whether the conduct prong of the
7 coordination regulations has been met based upon Gessler funding the PCJ mailer and his
8 role within the Armstrong campaign. The Complaint alleges that PCJ used corporate
9 funds to pay for a mailer critical of Coffman that was targeted only to registered
10 Republican voters in the 6th Congressional District shortly before the August 12 primary
11 election in which Coffman and Armstrong were candidates. See Complaint at 1-2. The
12 available information indicates that Scott Gessler, legal advisor to Wil Armstrong and the
13 Armstrong campaign, reportedly donated \$15,000 to PCJ for the creation and distribution
14 of the anti-Coffman mailer, which was paid for with a PCJ check signed by Curt
15 Cervený, PCJ's agent/treasurer at the time. Gessler and Cervený were involved in the
16 Colorado Right-to-Work Initiative: Gessler served as primary counsel for CRTW, which
17 received its entire funding of \$289,000 from PCJ, and Cervený worked as a campaign

⁴ The material involvement and substantial discussion standards of the conduct prong are not satisfied "if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2) and (3). See also *Coordinated Communications*, 71 Fed.Reg. 33190, 33205 (June 8, 2006) (explaining that "[u]nder the new safe harbor, a communication created with information found...on a candidate's or political party's Web site...is not a coordinated communication"). However, to qualify for the safe harbor for the use of publicly available information, Respondent "bears the burden of showing that the information used in creating, producing or distributing the communication was obtained from a publicly available source." *Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006). The safe harbor does not appear to apply in this matter as the available information does not indicate that material information was obtained from a publicly available source.

1 consultant on the Initiative. Also involved in both PCJ and the Initiative was John Berry,
2 who serves as treasurer of PCJ and registered agent of CRTW.

3 AFC denies involvement with the "preparation, development, or distribution" of
4 the mailer. See Armstrong Response at 1. AFC also states it is unaware of any
5 coordinated efforts between its agents and PCJ. *Id.* The available information, however,
6 suggests that Scott Gessler, who may have been an agent of the Armstrong campaign, by
7 funding the mailer critical of Armstrong's primary election opponent Coffman through
8 PCJ, avoided any explicit connection between the mailer and the Armstrong campaign.
9 Gessler may have had both the motive and the opportunity to request or suggest that the
10 mailer be created, produced or distributed, or may have been materially involved in
11 decisions regarding, or had substantial discussions about, pertinent aspects of the mailer.
12 See 11 C.F.R. § 109.21(d)(1) - (3). As legal advisor for Armstrong and AFC, Gessler
13 may have had actual authority to engage in activities on behalf of Armstrong for
14 Congress. See 11 C.F.R. § 109.3 (for purposes of the coordinated communications
15 regulations, an agent is a person with actual authority, express or implied, to act on behalf
16 of a specified person). If this is true, his actions would thus be imputed to AFC. See *id.*
17 In consideration of Gessler's roles as both providing funds for the PCJ mailer and as a
18 key advisor to the Armstrong campaign, and the other apparent commonalities and
19 relationships between the parties, we believe there is reason to investigate whether the
20 conduct prong of the Commission's coordination regulations has been met.

21 Thus, the PCJ mailer may satisfy all three prongs of the Commission's
22 coordinated communications regulations, and its payment for the mailer may be an in-
23 kind contribution to Armstrong for Congress. See 11 C.F.R. § 109.21(a) and (b).

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1 Because the activity in this matter may satisfy the conduct standards at section
2 109.21(d)(1) through (3), AFC may have accepted or received the in-kind contribution.
3 See 11 CFR § 109.21(b)(2). As a corporation, PCJ is prohibited from making
4 contributions, including in-kind contributions, to a federal candidate or authorized
5 committee, which is in turn prohibited from knowingly accepting or receiving corporate
6 contributions. See 2 U.S.C. §§ 441b(a) and 431(8)(A)(i); 11 C.F.R. §§ 100.52(d)(1) and
7 114.2(b)(1). In addition, corporate officers are prohibited from consenting to corporate
8 contributions. See 2 U.S.C. § 441b(a).

9 Accordingly, the cost of the PCJ mailer may be a prohibited corporate
10 contribution from PCJ to AFC. Therefore, we recommend that the Commission find
11 reason to believe that Protect Colorado Jobs, Inc. made, and Curt Cervený consented to, a
12 prohibited corporate contribution in violation of 2 U.S.C. § 441b(a). We further
13 recommend that the Commission find reason to believe that Armstrong for Congress, and
14 Brian Watson, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a) by
15 knowingly accepting or receiving a prohibited corporate contribution. Finally, there is
16 insufficient information available at this time on which to make a recommendation as to
17 John Berry, such as whether he was personally involved as a PCJ corporate officer.
18 Therefore, we recommend the Commission take no action with respect to him at this
19 time.

20 4. Reporting Violation

21 Political committees must disclose an in-kind contribution from a coordinated
22 communication as both a receipt and an expenditure made by that committee. 2 U.S.C.
23 § 434(b); 11 C.F.R. § 109.21(b)(1) and (3). Armstrong for Congress did not disclose the

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1 in-kind contribution that may have resulted from the coordinated communications paid
2 for by PCJ on either its 12-Day Pre-Primary, July Quarterly, or October Quarterly
3 Reports. Therefore, we recommend the Commission find reason to believe that
4 Armstrong for Congress and Brian Watson, in his official capacity as treasurer, failed to
5 disclose the in-kind corporate contribution from the coordinated communication in
6 violation of 2 U.S.C. § 434(b).

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IV. RECOMMENDATIONS

1. Find reason to believe that Protect Colorado Jobs, Inc. violated 2 U.S.C. § 441b(a) by making a prohibited corporate contribution.
2. Find reason to believe that Curt Cervený violated 2 U.S.C. § 441b(a) by consenting to a prohibited corporate contribution.
3. Find reason to believe Armstrong for Congress and Brian Watson, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441b(a) by accepting and failing to report a prohibited in-kind corporate contribution from Protect Colorado Jobs, Inc.
4. Take no action at this time with respect to John Berry.
5. Approve the attached Factual and Legal Analyses.
6.
7. Approve the appropriate letters.

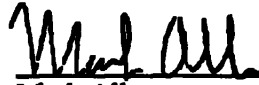
Thomasenia P. Duncan
General Counsel

2/6/09
Date

BY:


Ann Marie Terzaken
Associate General Counsel
for Enforcement


Stephen Gura
Deputy Associate General Counsel
for Enforcement


Mark Allen
Assistant General Counsel


Shana M. Broussard
Attorney

Attachments:

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2. Coffman mailer

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"Exhibit A" page one

Call Mike Coffman and ask him to stop increasing his office budgets, comply with immigration laws, and adopt strict office protocols to prevent political influence.

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MIKE COFFMAN

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"Exhibit A", page two

MIKE COFFMAN: AFTER 20 YEARS IN PUBLIC OFFICE, HE'S TURNED INTO A BIG GOVERNMENT PROFESSIONAL POLITICIAN.

As a professional politician, Mike Coffman has a record of bloated budgets and flawed policy decisions that have lead to a bigger and less efficient government.

As Colorado Treasurer from 1999-2007, Mike Coffman increased his office's budget by a whopping 33%. And in his first two years as Colorado Secretary of State, Mike Coffman increased the budget for that office by 29%...in just two years!

Unfortunately, those bloated budgets haven't resulted in better policy. In fact, under Mike Coffman, the Secretary of State's office refuses to report its compliance with a 2006 immigration law, saying the law doesn't apply to them. (See the State Auditor's Report, 5/26/08)

Unfortunately, in the past few years, Coffman's office policies have been called into question by members of both political parties and both Denver newspapers.

"Coffman's fellow Republicans and the Democrats called him a flip-flopper who contributed to possible chaos on Election Day." *Rocky Mountain News, May 6, 2008.*

"The chief of staff to Secretary of State Mike Coffman is doing campaign work for Coffman's congressional bid in an apparent breach of ethics, according to government watchdog groups." *Rocky Mountain News, March 7, 2008.*

"Secretary of State Mike Coffman has acknowledged that hiring a partisan activist to work in the state's elections division was a 'failure of leadership.'" *Denver Post, Jan. 20, 2007.*

"Coffman has faced other accusations that politics blend with politics in his office. Earlier this month, a state audit found that an elections employee appeared to have broken state law and personnel rules for operating a partisan political business on the side." *Denver Post, December 21, 2007.*